Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK W. SIMMONS,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN H. DOERINGER *
RICHARD M. KAMOWSKI
233 North Michigan Avenue
Chicago, Illinois 60601
(312) 565-1600

Attorneys for Respondent
Illinois Central Gulf Railroad Company

December, 1985

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

13 P

QUESTION PRESENTED

Whether the Interstate Commerce Commission is authorized to impose employee protective conditions when it approves a purchase offer of a rail line pursuant to 49 U.S.C. § 10905 and dismisses the corresponding abandonment application.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATUTE INVOLVED	2
ARGUMENT	2
CONCLUSION	3
APPENDIX A – 49 U.S.C. § 10905	1a
APPENDIX B – U.S. Code Cong. & Adm. News	6a

TABLE OF CITATIONS

U.S. Code Congressional And Administrative News, 96th Congress Second Session (1980), p. 4157 (see Appendix B)	3

In The

Supreme Court of the United States

October Term, 1985

PATRICK W. SIMMONS,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Illinois Central Gulf Railroad Company ("ICG") submits this Brief in Opposition to the Petition for a writ of certiorari filed by Petitioner, Patrick W. Simmons. An amicus brief in support of the Petition is expected to be filed by Railway Labor Executives' Association (RLEA).

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reproduced in Appendices A and D of the Petition, and are reported at 760 F.2d 126 (1985)

and 766 F.2d 1177 (1985), respectively. The decisions of the Interstate Commerce Commission are reproduced in Appendices F through K of the Petition.

STATUTE INVOLVED

The statute involved is 49 U.S.C. § 10905, a part of the Interstate Commerce Act as amended by the Staggers Rail Act of 1980. It is reproduced in part in Appendix L of the Petition, and is reproduced in full in Appendix A to this Brief.

ARGUMENT

Section 10905 of the Interstate Commerce Act, as amended five years ago by the Staggers Rail Act of 1980, does not contain any provisions for employee protection in a purchase offer for a line subject to an abandonment application. Indeed, the statute requires the dismissal of an abandonment application when the Commission approves a sale transaction under Section 10905. Both the Interstate Commerce Commission and the United States Court of Appeals, in two cases, have found no basis or statutory jurisdiction for the Commission to impose protective conditions on either the selling carrier or the purchaser in such a transaction.

The statute on its face does not require any protective conditions. The public and the railroads should be able to rely on Section 10905 as Congress enacted it five years ago, not engrafted with conditions which the rail labor unions wish imposed here (Petitioner Simmons is the Illinois legislative director of a large rail union). Petitioner makes a strained argument attempting to "read in" labor protection into Section 10905 from other sections of the act and from Section 10905 as it existed prior to the enactment of the Staggers Act.

A brief legislative history of the present Section 10905 is reported in U.S. Code Congressional And Administrative News, 96th Congress Second Session (1980), p. 4157 under Section 402—Abandonment. This is reproduced as Appendix B of this Brief. The sole purposes of the new Section 10905 are to provide continued rail service to shippers, and to spare carriers from protracted legal proceedings in the abandonment process. The history also shows that Congress totally repealed the prior Section 10905, which Petitioner here claims to be carried over into the new Section 10905 enacted with the Staggers Act of 1980.

CONCLUSION

This Court should deny the Petition for writ of certiorari, since there is no serious issue of statutory interpretation. Both the Interstate Commerce Commission and the Court below have interpreted the statute enacted in

1980 as it is plainly written and as the legislative history bears out.

Respectfully submitted,

JOHN H. DOERINGER *
RICHARD M. KAMOWSKI
233 North Michigan Avenue
Chicago, Illinois 60601
(312) 565-1600

Attorneys for Respondent
Illinois Central Gulf Railroad Company

* Counsel of Record

December, 1985

APPENDIX A

49 U.S.C. § 10905

§ 10905. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) "avoidable costs" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Commission—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over

that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) That decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may

accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1405; Pub.L. 96-448, Title IV, § 402(c), Oct. 14, 1980, 94 Stat. 1942.

APPENDIX B

U.S. Code Congressional And Administrative News, 96th Congress Second Session (1980), p. 4157

SECTION 402—ABANDONMENT

Senate bill.—Section 202 of the Senate bill alters the existing provisions of the Interstate Commerce Act relating to abandonment of railroad lines. This section expedites abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications, depending on the complexity of and the opposition to the abandonment proceeding. For example, under existing law, there is no time limit within which an investigation of an abandonment application must be concluded. Section 202(c)(3) places a time limit of 135 days upon such investigations.

Section 202 repeals existing 49 U.S.C. 10905. New section 10905 creates a mechanism that requires railroads to sell a railroad line approved for abandonment to a financially responsible party if the financially responsible party has offered to pay the acquisition cost of the line or the difference between the revenues attributable to providing that service plus a reasonable return on the value of the line. Section 202 also requires rail carriers petitioning for abandonment of a railroad line to provide interested parties an estimate of the subsidy or the minimum purchase price required to keep the line in operation, calculated in accordance with the new provisions in 49 U.S.C. 10905.

The provisions in section 202 assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process.

House amendment.—No provision.

Conference substitute.—The Conference substitute adopts the Senate provision.